EMPLOYMENT TRIBUNALS

Claimant: **Jeffrey Bonner**

Respondent: **Moorefield Eye Hospital NHS Foundation Trust**

Heard at: **London Central Employment Tribunal via CVP** **On: Friday, 28th October 2022**

Before: **Employment Judge M. Salter**

Representation:
Claimant: In person and no representative.
Respondent: Ms. E. Skinner, counsel.

JUDGMENT

1. It is the judgment of the tribunal that the Claimant's claim is:

    a. estopped form proceeding on the basis of cause of action estoppel; or
    b. an abuse of process under the principle of Henderson v Henderson

    the claim is therefore dismissed.

2. The Claimant shall pay the Respondent's costs of £1,491.40.

REASONS

References in square brackets below are unless the context suggests otherwise to the page of the bundle. Those followed by a with a § refer to a paragraph on that page and references that follow a case reference, or a witness' initials, refer to the paragraph number of that authority or witness statement.

References in round brackets are to the paragraph of these reasons or to provide definitions.

INTRODUCTION

1. These are my reasons given orally at the Preliminary Hearing on 28th October 2022. In accordance with Rule 62(3) of Schedule 1 of the

Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("the 2013 Regulations") written reasons will not be provided unless they are asked for by any party at the hearing or by a written request presented within 14 days of the sending of the written record of the decision. If no such request is made, then the tribunal will only provide written reasons if requested to do so by the Employment Appeal Tribunal or a court.

2. The Employment Tribunal is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: https://www.gov.uk/employment-tribunal-decisions. The Employment Tribunal has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the Employment Tribunal for an order to that effect under Rule 50 of the Tribunal's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness.

3. These reasons have been prepared at the request of Mr. Bonner. He requested them within the 14-day time limit, but that request was not sent to me until much later.

BACKGROUND

<u>The Claimant's case as formulated in his ET1</u>

4. The Claimant was dismissed from his employment by the Respondent. He presented an ET1 on 16th January 2022, complaining of unfair dismissal (2200259/2022)("the First Claim") and the matter was heard by Employment Judge Galbraith Martin on 29th and 30th June 2022. Both parties were represented by counsel. The Claimant's claim was dismissed qt the end of that hearing and written reasons were not requested ("the Liability Judgment").

5. On 11th July the Respondents applied for the Claimant to pay their costs incurred defending that claim. the Claimant responded to that application on 20th June 2022. A hearing was conducted on 26th August 2022 where the Claimant s represented by a trainee solicitor and the Respondent by counsel. Judgment was reserved and a written judgment was given sent to the parties on 5th September 2022. In that Judgment he was ordered to pay costs to the Respondent of £3,235.00 ("the Costs Judgment").

6. No appeals or requests for reconsiderations were received for either of the Liability or Costs judgments.

7. Also on the 11th July 2022 the Claimant presented a second ET1 (2204578/2022)("the Second Claim"). The details of what the Second Claim consisted of were not clear from the Claim Form itself.

8. On 13th September 2022 the Tribunal listed the matter to determine whether the claims should be struck out as being out of time, or an abuse of process pursuant to the principle of Henderson v Henderson.

9. In its response to the Second Claim the Respondent contended "principles of res judicata" applied to the Second Claim, as the matters contained therein could only relate to the First Claim.

THE PRELIMINARY HEARING

General

10. The matter came before me with a one-day time estimate.

11. The Claimant represented himself. The Respondent was represented by Ms Skinner, as it has been throughout all hearings to date.

12. This was a remote hearing which was not objected to by the parties, being conducted entirely by CVP video platform. A face-to-face hearing was not held because it was not practicable, and no-one requested the same it was conducted using the cloud video platform (CVP) under rule 46.

13. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no significant difficulties.

14. The participants were told that it was an offence to record the proceedings.

DOCUMENTS AND EVIDENCE

Witness Evidence

15. I heard evidence from the Claimant.

Bundle

16. To assist me in determining the matter I have before me an agreed bundle consisting of some 118 pages prepared by the Respondent. My attention was taken to a number of these documents as part of me hearing submissions and as discussed with the parties at the outset of the hearing, before commencing their submissions, I have not considered any document or part of a document to which my attention was not drawn. I refer to this bundle by reference to the relevant page number.

EVIDENCE

17. I heard brief evidence from the Claimant. In his evidence he told me:

    (a) the rejection of an amendment application to the First Claim caused the application for ACAS;
    (b) as his employment prospects had not improved, he had submitted the emails from Pulse and Reed employment.
    (c) Whilst he accepts what Employment Judge Galbraith-Martin said, it was his inability to return to work for the Respondent or to work via agencies that led to this claim.

SUBMISSIONS

18. I heard submissions from both parties. These submissions were brief.

The Respondent

19. In their submissions, (1017-1025) the Respondent:

    (a) Pointed out the claimant's motivation for presenting the second claim was the failure of his first claim and he was trying again to litigate the matters by advancing the same arguments that had been rejected by Employment Judge Galbraith-Martin. The second claim was simply an attempt to have a second run at the matters already determined in the First Claim;
    (b) Highlighted that the Claimant identified factors for the second claim which the Claimant relied upon were that his employment prospects had not improved and that he was seeking redeployment with the Respondent were all matters of remedy for the First Claim.
    (c) Argued that therefore the tribunal is let with a claim that concerns the consequences of his dismissal which failed in the First Claim. it was

clearly submitted a short period of time after the first claim had failed, and where the Claimant was represented by counsel.

(d) Asked me to find that the second claim was an abuse of process as the Claimant was seeking to litigate maters that have already been determined, in the alternative I was asked to find that the second claim was an abuse under the principle of Henderson.

The Claimant

20. In his submissions the Claimant stated he was aware of the concept of corporate manslaughter. When asked what the relevance of this was to the allegation, I was asked to determine the claimant stated that corporate manslaughter is in the GCSE and A Level syllabus and that he as thinking about train drivers being taken to court.

21. When I asked him what the relevance of Corporate Manslaughter was to the issue, I had to determine the Claimant accepted it was not relevant to the issues, but he was an individual whilst the Respondent is a body.

22. I asked him if he wished to address the points on abuse of process the Respondent had raised, in its application and submissions, the Claimant said he did not.

THE LAW

Abuse of Process And Henderson v Henderson

23. Cause of action estoppel prevents a party pursuing a cause of action that has been dealt with in earlier proceedings involving the same parties. Issue estoppel prevents a party reopening an issue that has been decided in earlier proceedings involving the same parties.

24. 'Henderson abuse of process' (arising from Henderson v Henderson 1843 3 Hare 100, ChD) precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. According to Sir James Wigram VC, 'where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case'.

25. Lord Bingham in Johnson v Gore Wood and Co [2002] 2 AC 1, stated that Henderson:

> 'abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances'.

Costs

26. The Tribunal's power to award costs and the amount of a costs order is contained in rule 76 & rule 78 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, Schedule 1: -

> 76(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that –

(a) A party …has acted vexatiously…or otherwise unreasonably in either bringing of the proceedings (or part)…; or
(b) Any claim or response had no reasonable prospects of success.

78(1) A costs order may-
(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party.

27. The consideration of costs is a two-stage process: firstly the tribunal must decide if r76 has neem engaged, and if so the second stage is to decide whether to award costs. (Oni v UNISON UKEAT/0370/14/LA)

28. Definition of 'vexatious' was given by Lord Bingham in Attorney General v Barker [2000] 1 FLR 759, QBD (DivCt):

> "the hallmark of a vexatious proceeding is... that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process".

29. 'Unreasonable' has its ordinary English meaning. When considering this the tribunal must looks at the entire history and picture of the claim when determining if there has been unreasonable conduct: Barnsley Metropolitan Borough Council v Yerrakelva 2012 IRLR 78, CA.

30. The test of whether the claim had no reasonable prospects of success, should be judged based on the information that was known or reasonably available at the start: Radia v Jeffries International Limited [2020] IRLR 431.

31. The fact the Claimant represented himself is a factor I should bear in mind, and I should not apply professional standards to those who represent themselves: AQ Limited v Holden [2012] IRLR 648 EAT.

32. Rule 84 states that when deciding whether to make costs order the Tribunal may have regard to the paying party's ability to pay.

33. Costs should be limited to those "reasonably and necessarily incurred'.

CONCLUSIONS

34. I sought clarification from the Claimant to what his complaints were, and he told me that it was his inability to obtain paid employment or in his words the "Inability to return to work for the Respondent or to work via agencies."

35. This is a consequence of the Claimant's dismissal, that dismissal has already been litigated, the Claimant was unsuccessful, and he has not appealed that decision nor, as far as I was aware, had he sought any reconsideration of the decision. His claim in this regard has been rejected by the tribunal in the First Claim.

36. I conclude that there is therefore nothing the tribunal can do on the issues the claimant has already raised.

37. On the evidence and submissions have heard I have determined that there is a cause of action estoppel: the Second Claim is litigation between the same parties and the Claimant is relying on the same cause in the First Claim. The issue of the Claimant's failure to mitigate his loss would have been an issue determined in the First Claim, alternatively it is an issue that has been determined.

38. If I am wrong on this point and despite the claimant's evidence and submissions, and in fact the Second Claim is wider than his explanation, then any claim concerning the termination of the Claimant's employment falls within the remit of the principle in Henderson: it could of and should have been litigated before in the First Claim; any second claim would cover such issue of fact which are so clearly part of the subject matter of the First Claim and so clearly could have been raised then, it would be an abuse of the tribunal's process to allow new proceedings to be started in respect of them. If called on to determine this, I would conclude therefore that the second claim was an abuse of the tribunal's process within the meaning of Henderson. Taking into account all the circumstances of this case, and adopting a merits based approach, the question for me is whether the Claimant is abusing the tribunal's process by seeking to raise a matter that he should have raised before: I would have found he was: if this claim is different from the matters covered in the First Claim, it clearly should have

been brought as part of the First Claim, there is no explanation for why it had not been included in the First Claim

39. I therefore consider that the second claim had been determined in the first claim when that was unsuccessful or was an abuse of process under the principle of Henderson.

Costs Application

40. After delivering my judgment on the above application the Respondent made an application for costs.

41. I was provided with a small bundle of correspondence including a costs warning letter of 11th October 2022. The Costs warning letter was in clear terms and came 14 days after the Response had been accepted. The Response gave the claimant 14 days to withdraw his claim and not face a costs application.

42. The Claimant stated that there had been a material change in his circumstances from the time when the first costs order was made against him. The Claimant had not provided any evidence of his means, but wished to give evidence on them. The Respondent sought instructions and said it wished to proceed with its application for costs without the Claimant providing any disclosure on his means. The Claimant was content to proceed in this way.

43. The Claimant was affirmed and in evidence:

    (a) confirmed that he had around £20,000 in various bank accounts (down from the £30,000 he had at the time of the original hearing);
    (b) he still received £1,000 a month from his mother albeit that this is taxed as business income rather than inheritance;
    (c) He is now also in receipt of Job Seeker's Allowance;
    (d) There was nothing else he wished me to consider.

44. After the claimant's evidence ended, I sought submissions from both parties. The claimant did not wish to make any submissions. I asked him if he was sure about this, and he confirmed that he as sure.

45. The Respondent's submissions followed their costs warning letter and argued that the Claimant's conduct was vexatious, and his second claim had no reasonable prospects of success.

46. I rose to consider my judgment.

47. The award of costs is a two-stage test: firstly I must assess whether the relevant threshold has been met and, in circumstances where it has, I must consider whether to exercise the discretion in the particular circumstances of the case before me.

48. I remind myself that costs in the employment tribunal are the exception, and that generally the parties bear their own costs, and any award of costs is compensatory, and not punitive.

49. On the basis of what I have heard and what I have found I believe that the claimant's:

    (a) actions in presenting the second claim, so soon after the employment tribunal had rejected his first claim, and covering the same issues as contained within that first claim are vexatious within the meaning set out in Barker (above) in that its effect is to subject the Respondent to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and it was an abuse of the tribunals process; and/or
    (b) objectively the Second Claim had no reasonable prospects of success, and this would have been clear to the Claimant from the Response and the costs warning letter at the very latest.

50. The Claimant's behaviour resulted in the Respondents defending the Second Claim and incurring costs as a result of this.

51. I therefore considered that the relevant threshold had been met. Having determined this I moved on to consider whether the discretion should be exercised. I have considered the:

    (a) entirety of the litigation of the Second Claim;
    (b) chronology: I looked at the chronology of the claim and in particular that the Respondent's cost warning letter was dated 11th October 2022, that is 14 days after the entry by the Respondent of its Grounds of Resistance. The Grounds of Resistance gave the Claimant 14 days to withdraw his claim;

(c) Claimant's account and explanation to me of the motivation for the Second Claim;
(d) fact the Claimant is a litigant in person and has presented claims in a usually cost-neutral jurisdiction;
(e) claimant's means and, although he is unemployed, he has a source of income and a level of savings;
(f) cost warning letter and the Claimant's failure to engage with it in circumstances where the Claimant was aware of the tribunal's power to award costs against parties.

52. Taking these factors into account I determined that the discretion should be exercised. I considered what level of costs should be permitted. From the 11th October 2022, at the latest, the Claimant should have been aware that his claims, based as they were on the consequences of his dismissal, had no reasonable prospect of success and he was able to extricate himself from the litigation without any risk of costs.

53. I finally then considered the question of the amount of any costs order I should make. Again, I considered the Claimant's means here.

54. I consider that the Claimant should pay to the Respondent the costs it has incurred from the date of the Costs Warning letter, that is 14 days after it entered its Grounds of Resistance: the 11th October 2022. I am told this is a total of £1,491.40 as these costs were reasonably and necessarily incurred by the Respondent in defending the Second Claim, and have been shown a costs schedule in this amount. I accept this evidence.

Employment Judge Salter

Friday, 24 March 2023
Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

.24/03/2023

FOR THE TRIBUNAL OFFICE

Notes
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment- tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.